IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 406 of 1983

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE R.BALIA.

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

DEEPAK TALKIES

Versus

COMMISSIONER OF INCOME TAX

Appearance:

MR BJ SHELAT WITH MR MANISH R BHATT for Petitioner

MR DA MEHTA WITH MR RK PATEL AND BD KARIA FOR for Respondent No. 1

CORAM : MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE R.BALIA.

Date of decision: 09/01/97

ORAL JUDGEMENT

(Per Rajesh Balia, J)

1. At the instance of the assessee, the Income Tax Appellate Tribunal, Ahmedabad Bench, `A' has referred the

following questions of law arising out of its order in ITA No.2548/Ahd/81 for the assessment year 1977-78:

1. "Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in upholding the order of the Income tax Officer passed under Section 154 of the Act reducing depreciation from 15% to 5% on various items connected with theatre building, such as, plaster of paris, main gate, sanitary etc.?"

2. "Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law inholding that the order passed by the I.T.O. was within jurisdiction conferred upon him by virtue of Section 154 of the Act, and whether the Tribunal was further justified in holding that the I.T.O. was justified in holding that the I.T.O. was justified in reducing depreciation from 15% to 5% on fibre glass costing Rs.19,387/- even though the Appellate Asstt. Commissioner had deleted the said item from the order passed under Section 154 of the Act.?"

2. The facts as appearing from the statement of the case and the order of the Tribunal are that at the time of assessment the assessee had claimed the depreciation on the written down value of various items, namely plaster of paris, theatre building, main gate, sanitary fittings and fibre glass at the rate of 15% by treating the same to be part of fixtures and plant owned by the assessee and used for the purposes of carrying on his business. The claim of the assessee was allowed and the depreciation was computed at 15% of the written down value of each of the items referred to above. Subsequently, the Income Tax Officer, exercising power under Section 154 issued notices for reducing the rate of depreciation from 15% to 5%. The mistake apparent on the face of the record which was sought to be made out by the Income Tax Officer was that all the items stated above were integral part of the building and were not plant and therefore the rate of depreciation which was applicable to building only could be applied for computing the allowable deduction. The Income Tax Officer rejecting the plea of the assessee that there was no mistake apparent on the face of record had accordingly made the order rectifying the previous assessment by reducing the

rate of depreciation on the aforesaid items.

3. On appeal before the Appellate Assistant Commissioner, the assessee's contention was partly accepted in respect of fibre glass. The Tribunal found that from reading of these items and expenditure thereon the items are part of the building and the benefit of enduring nature and therefore no reason to interfere with the order of Assistant Appellate Commissioner.

4. Before us the only question urged by the learned counsel for the petitioner is that the mistakes stated by the Income Tax Officer for the purpose of invoking jurisdiction under Section 154 are not mistakes apparent on record which could be corrected in exercise of power under Section 154 and therefore the Tribunal has erred in sustaining the order under Section 154. Learned counsel for the revenue on the other side urged that that it was not a matter of argument that the theatre is being run in a building, Plaster of paris is part of the walls and other structure of the building itself and other items namely main gate, sanitary fittings are also integral part of the building itself. This being so, it is not a matter of argument that rates which are applicable to building for computation of depreciation only were applicable and the same could not have been subjected to rates applicable for plant and fixtures.

5. Having carefully considered the rival contentions we are of the opinion that contention of learned counsel for the assessee merits acceptance. It has pointed out that in S.K.Tulsi and Sons v. C.I.T. reported in 187 ITR 685, Allahabad High Court has taken the view that theatre building itself has to be considered as a plant for the purpose of calculating depreciation under Section 32. Our attention has also been invited to a decision of Karnataka High Court in Santosh Enterprises vs. CIT reported in 200 ITR 353 wherein it has been held that not the main building but wooden panelling on the walls etc and the chairs which have been fixed to floor to be used by the spectators are to be treated as plants and not as a part of the building for the purpose of computation of depreciation of development rebate. A decision of this court has also been referred to in Income Tax Reference No. 248 of 1982 M/s.Patel Enterprises vs. CIT decided on 17.12.1987 wherein the question referred by the Tribunal at the instance of assessee was:

"Whether in the circumstances of the case, the Tribunal was right in not treating the theatre as plant but a mere building and therefore

withdrawing development rebate of Rs.1,99,572/allowed."

6. The Court answered the question in favour of the assessee by holding that the theatre is a plant and not merely a building. By referring to the decision of the Supreme Court CIT, Gujarat vs. Elecon Engineering Co. Ltd. reported in 166 ITR 66.

7. From the aforesaid, it is apparent that the very question whether a theatre building itself can be treated as a plant or not has found different interpretation by different High Courts and the fixtures and fittings attached to such theatre building can be treated plant or not have also received different interpretation depending upon whether theatre building itself can be treated as plant. In such state of affairs, it cannot be said that if Income Tax Officer has accepted one of the views canvassed by the assessee in his assessment he committed any such mistake which could be said to be a mistake apparent on the record, particularly in view of the decision of this court within whose territorial jurisdiction he was functioning. The limits of exercise of jurisdiction under Section 154 are well defined. Supreme Court in TS Balaram, ITO, Company Circle IV, Bombay v. Volkart Brothers and others reported in 82 ITR 50 dealing with the provisions of Section 35 of the Indian Income Tax Act, 1922 corresponding to the provisions of Section 154 of the Act of 1961, stated the law to be thus :

"It was not open to the Income-tax Officer to go into the true scope of the relevant provisions of the Act in a proceeding under Section 154 of the Income-tax Act, 1961. A mistake apparent on the record must be an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may conceivably be two opinions."

8. In arriving at the aforesaid conclusion, their Lordships equated the scope of expression `mistake apparent on record' with the scope of writ of certiorari which can be issued for correcting the patent errors in any order and said :

"An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions cannot be said to be an error apparent on the face of the record. A decision on a debatable point of law is not a

mistake apparent from the record"

Applying the aforesaid test, we have no hesitation in stating that in view of the state of affairs about the interpretation of the question whether a theatre building can be a plant in any circumstance or not is a debatable issue and cannot be considered to be a mistake apparent on record. The Income Tax Officer was not justified in exercising the jurisdiction under Section 154, and Tribunal was not justified in affirming that order.

9. Accordingly, we answer the questions referred to us in the negative that is to say in favour of the assessee and against the revenue. Reference accordingly stands disposed of. No costs.